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100TH CONGRESS
2d Session

SENATE

REPORT
100-378

GENERAL AVIATION ACCIDENT LIABILITY STANDARDS ACT

JUNE 2, 1988.—Ordered to be printed

Filed under the authority of the order of the Senate of May 27 (legislative day, May 18), 1988

Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

[To accompany S. 473]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 473) to regulate interstate commerce by providing for uniform standards of liability for harm arising out of general aviation accidents, having considered the same, reports favorably thereon with amendments and recommends that the bill do pass.

PURPOSE OF THE BILL

The purpose of the bill is to establish uniform Federal product liability standards for harm arising out of a general aviation accident. The application of this legislation is limited to those aircraft that carry fewer than 20 passengers and are not engaged in regularly scheduled passenger service. Product liability actions arising out of a general aviation accident could be brought in either State or Federal court and would be subject to the liability standards established by the bill.

BACKGROUND AND NEEDS

Privately owned and operated aircraft make up a major segment of our Nation's air transportation industry. In 1987, there were more than 219,000 general aviation aircraft in operation in the United States. Last year, these aircraft flew approximately 34.4

million hours in our Nation's airspace, and covered nearly 4.3 billion miles—slightly more than the combined operations of the U.S. commercial air carrier fleet.

While general aviation is clearly a major segment of the industry, its future viability has been severely threatened by a withering domestic manufacturing base. Production of general aviation aircraft by U.S. manufacturers has declined precipitously since the peak years in the mid-to-late 1970's. This has been highlighted by the fact that sales by domestic manufacturers have fallen from a peak of 17,811 in 1978 to only 1,085 units sold in 1987.

This decline in sales has affected virtually every manufacturer and is reflected in sales of all types of aircraft.

GENERAL AVIATION AIRCRAFT SALES

	1978	1981	1987
Total units	17,811	9,457	1,085
Single engine	14,398	6,608	613
Multi engine	2,634	1,542	87
Turboprop	548	918	263
Jet	231	389	122

MANUFACTURERS—UNIT SHIPMENTS

	1978	1987
Cessna	8,770	187
Piper	5,276	282
Beech	1,367	314
Gulfstream	933	30
Mooney	379	143
Beilanca	369	(1)
Ayres	134	(2)
Gates Learjet	102	16
Lake	98	23
Maule	88	54
Fairchild	51	36

[1] Out of business. [2] Not available.

There have been a number of causes for this decline. In a June 1986 study by the Department of Commerce on the competitiveness of U.S. general aviation manufacturers, these were enumerated to include a large fleet of already operative aircraft, growing foreign competition, declining numbers of active pilots, rapidly increasing airplane prices, and product liability exposure.

This legislation is intended to address the problem of increasing exposure to product liability costs, a major concern for aircraft manufacturers as well as pilots. Testimony at Committee hearings on this subject indicated the extent to which the liability burden was harming the manufacturers of general aviation aircraft. In 1977, the industry paid $24 million in claims for judgments, settlements, and defense costs, based on revenues of $1.49 billion. By 1985 (the last year for which data was collected), the product liability costs had dramatically increased to $210 million—without any increase in the dollar value of industry sales.

Because the increased costs of product liability, which in 1985 averaged more than $70,000 per aircraft, are passed on to the consumer, new sales have in recent years slowed dramatically. Correspondingly, manufacturers have cut back on production, in some cases to the detriment of U.S. aviation interests. For example, testimony at the hearing indicated that piston engine-powered airplanes, which have historically accounted for 90 percent of all unit sales, are now practically out of production. Perhaps of even greater concern is the fact that at a time when the commercial airlines are increasingly drawing from the ranks of private pilots, there is not one trainer aircraft now being produced in this country.

Yet, while sales of general aviation aircraft have been depressed in recent years by escalating product liability costs, the overall safety of the industry has continued to improve. Accident rates for the industry have been dropping to record lows. In fact, for the fifth year in a row, the total accident rate and fatal accident rate dropped in 1987, to 8.25 and 1.45 per 100,000 aircraft hours, respectively.

The bill reported by the Committee is in response to this situation. It is intended to bring uniformity, clarity, and a greater degree of certainty to the general aviation industry with respect to product liability exposure. These intended benefits should help establish a favorable environment for a viable domestic general aviation industry, and help restore some of the thousands of jobs that have been lost. The resulting stability should help ensure continued preeminence in the aviation field, encourage continued development of safe aircraft, foster research and development into new technology, and ensure that those harmed in a general aviation accident are not denied compensation because there is no industry remaining to be held accountable.

LEGISLATIVE HISTORY

On February 4, 1987, Senator Kassebaum introduced S. 473. A hearing on the bill was held by the Subcommittee on Aviation on December 3, 1987. Witnesses included representatives from the general aviation manufacturing industry, aircraft owners and operators, and attorneys interested in general aviation accidents and liability standards.

There are currently 23 cosponsors of S. 473, including 8 members of the Committee. The bill is identical to legislation which was reported by the Committee and considered by the Senate in the 99th Congress. It is also similar to legislation (H.R. 2238) that is pending before the House of Representatives.

On April 26, 1988, the Committee met in open executive session to consider S. 473. The Committee then ordered the bill reported on a voice vote.

SUMMARY OF MAJOR PROVISIONS

Liability standards

This bill establishes standards for liability arising out of general aviation aircraft accidents. It provides four alternative means of establishing liability:

(1) the party's negligence as the proximate cause of the harm;

(2) the defective condition of a product, i.e., if the product left the manufacturer's control in "a defective condition unreasonably dangerous for its intended purpose according to engineering and manufacturing practices which were reasonably feasible." The defect must have been a proximate cause of the harm, and the aircraft must have been used in the manner for which it was made;

(3) failure to warn of a known danger, i.e., if the manufacturer knew or reasonably should have known of a danger connected with the product, either before or after the product left the manufacturer's control, and failed to warn or instruct the user of the aircraft. The known danger must have been the cause of the claimant's harm. The provision does not apply if the warning would not have materially affected the conduct of the user of the product; and

(4) failure to conform to an express warranty provided by the manufacturer if the failure was a proximate cause of the harm.

If the manufacturer proves by a preponderance of the evidence that a defective condition could have been corrected by compliance with a Federal Aviation Administration (FAA) airworthiness directive or a manufacturer's service bulletin, the manufacturer is not liable. Evidence of compliance with government standards is expressly admissible on the issue of whether the product was defective.

Comparative responsibility

The bill adopts the rule of comparative responsibility, and requires the trier of fact to apportion responsibility for the harm among the plaintiff, all defendants, and any others not before the court. The parties are then responsible for their proportionate share of the damages.

The defendants' liability is several but not joint, with two exceptions. A manufacturer of the airframe is jointly and severally liable for defective systems or parts which it either installed or certified as part of the original design. The manufacturer of a particular component or system also is jointly and severally liable for harm caused by defects in that system or any subpart of it. A defendant with joint liability may seek indemnification from other jointly liable defendants.

Punitive damages

The bill limits the availability of punitive damages to situations in which the plaintiff proves by clear and convincing evidence that the harm was "the direct result of conduct manifesting a conscious, flagrant indifference to . . . safety . . ." Evidence regarding the defendant's financial worth or otherwise related only to punitive damages is not admissible unless the plaintiff's ability to demonstrate a prima facie case for punitive damages has been previously established.

Time limitations

Statute of repose.—The manufacturer's liability is limited to the first 20 years after delivery of the product from the manufacturer to the first purchaser or to the first aircraft seller or lessee. Liability for replacement parts also is limited to the first 20 years after the date of the replacement or addition. These limitations do not apply if there is an express warranty that the product or part is suitable for use for a longer period of time.

Statute of limitations.—The bill preempts State statutes of limitations and substitutes a 2-year limitations period. It also requires service of the summons and complaint within 120 days after filing of the complaint, subject to minor exceptions.

Other provisions

Jurisdiction.—The bill provides for jurisdiction over the liability actions covered by the bill in Federal district courts, concurrent with State courts. It also provides for removal to Federal court on motion of the defendant, and contains a venue provision.

Evidentiary provisions.—Evidence of actions taken after an accident which may have made the accident less likely are not admissible on the issue of liability, but are admissible to the extent permitted by Rule 407 of the Federal Rules of Evidence.

Admissibility of certain evidence.—On the issue of the amount of the claimant's harm, evidence is admissible of the tax liability for, and the present value of, earnings alleged to have been lost by the claimant as a result of the accident.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 11, 1988.

Hon. ERNEST F. HOLLINGS,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 473, the General Aviation Accident Liability Standards Act of 1987, as ordered reported by the Senate Committee on Commerce, Science, and Transportation, April 26, 1988. CBO estimates that enactment of the bill would result in no significant cost to the federal government and in no cost to state or local governments.

S. 473 would establish federal standards for determining liability for injuries or property damage arising out of general aviation accidents. Specifically, the bill would establish standards applicable to the liability of general aviation manufacturers as well as defenses available to them.

Both state and federal courts would have jurisdiction over general aviation accident liability cases under this act, but actions brought in a state court could be removed to a federal district court

by any defendant without the consent of any other party. The bill would preempt state law to the extent that it establishes a rule of law or procedure applicable to a claim, but would not affect sovereign immunity defenses or workers' compensation law.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

JAMES L. BLUM,
Acting Director.

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation:

The bill would establish uniform Federal liability standards for harm arising out of a general aviation accident. The Committee does not expect this legislation to require any additional regulation, and therefore does not expect it to subject individuals or businesses to any additional regulation or paperwork. Further, the bill would have no impact on either the privacy of any individuals or the budget.

SECTION-BY-SECTION ANALYSIS

Section 1.—Short title

This section contains the short title of the legislation, as amended, the "General Aviation Accident Liability Standards Act of 1988".

Section 2.—Findings and purpose

Subsection (a) sets forth Congressional findings regarding the necessity for the legislation.

Subsection (b) states that the purpose of the bill is to establish standards for determining liability for harm arising out of general aviation accidents.

Section 3.—Definitions

This section contains definitions of 8 terms used in the bill. Paragraph (4) defines "general aviation aircraft" to include all aircraft which have been issued a type certificate or airworthiness certificate by the FAA; which at the time the certificate was issued had a maximum seating capacity of less than 20 passengers; and which were not, at the time of the accident, engaged in scheduled passenger carrying operations.

Paragraph (5) defines "general aviation manufacturer" to include the builder or manufacturer of the airframe, engine, or any system, component, subassembly, or other part of a general aviation aircraft.

Paragraph (6) defines the term "harm" to include property damage, bodily injury, death resulting from bodily injury, pain and suffering caused by such bodily injury, and emotional harm caused by such bodily injury.

Section 4.—Preemption; applicability

Section 4(a) provides that this bill supersedes any State law regarding recovery, under any legal theory, for harm arising out of a general aviation accident, to the extent that this bill establishes a rule of law or procedure applicable to the claim. With respect to matters not addressed by this bill, courts may make reference to applicable State law.

It is the general intent of this bill to establish rules of Federal law to determine the liability of persons responsible for harm arising out of general aviation accidents. Congress has previously, through Federal law, established rules of liability for certain types of injuries in areas of specific Federal concern. See, e.g., Federal Employers' Liability Act, 45 U.S.C. 51–59 (liability for injuries to railroad employees); the Jones Act, 46 App. U.S.C. 688 (liability for injuries to merchant seamen).

Section 4(b) provides that this bill shall not be construed to supersede, waive, or affect any defense of sovereign immunity asserted by the United States or any State.

Section 4(c) provides that this bill shall not be construed to affect liability with respect to any aircraft that is not a general aviation aircraft for damages arising out of the operation of an aircraft that is not a general aviation aircraft. This provision is intended to insure that this bill will not be construed to limit or affect the liability of manufacturers of large commercial aircraft or the owners or operators of aircraft used in scheduled airline operations.

Section 4(d) provides that no right of action for harm exists under this bill if the right would be inconsistent with the provisions of any applicable workers' compensation law. The intent of this provision is to maintain the employer's immunity from tort liability for injuries to its employees to the extent provided under applicable State workers' compensation law.

Section 4(e) provides that the bill applies to manufacturers, owners, or operators of any general aviation aircraft, and any person who repairs, maintains, or provides any other support for such an aircraft. The bill also applies to occupants of general aviation aircraft, persons who bring an action on behalf of such an occupant, and nonoccupants if they are bringing an action based on harm to an occupant. For example, the surviving spouse of an occupant killed in a general aviation accident may bring on action for bereavement or loss of consortium. That action would be subject to the provisions of the bill since it arises out of harm to an occupant of a general aviation aircraft.

The bill does not apply to actions brought by or on behalf of nonoccupants for their own injuries caused by a general aviation aircraft, such as persons on the ground at the time of an accident. The bill also has no application to occupants of, or to manufacturers, owners or operators of, any non-general aviation aircraft or any other mode of transportation that may be involved in an accident with a general aviation aircraft. However, the fact that a general aviation aircraft may be involved in an accident with a non-general aviation aircraft does not negate the application of the bill to the manufacturers, owners, operators, or occupants of the general aviation aircraft.

Section 5.—Uniform standards of liability for general aviation accidents

Section 5 provides that liability for harm arising out of a general aviation accident may be established on the basis of negligence or, in three circumstances, an alternative standard.

Subsection (a) provides that any person claiming damages for harm arising out of a general aviation accident may bring an action and may recover damages from a party, if such party was negligent and such negligence is a proximate cause of the claimant's harm. The terms negligent and negligence are not defined in the bill, but are intended to be consistent with the definitions contained in the Restatement (Second) of Torts (1965). See sections 281–282 of the Restatement in order to recover under subsection (a), a claimant must prove that the defendant engaged in conduct which falls below the standard necessary to protect others against unreasonable risk of harm and that the conduct was the proximate cause of the harm.

Subsection (b)(1) provides for liability based on defects in design or construction. Liability against a general aviation manufacturer may be established by the claimant's demonstrating that (1) the product left the control of the manufacturer in "a defective condition unreasonably dangerous for its intended purpose, according to engineering and manufacturing practices which were reasonably feasible", (2) the defect is a proximate cause of the harm, and (3) the aircraft was being used at the time of the accident for a purpose and in a manner for which it was designed and manufactured.

The phrase "defective condition unreasonably dangerous for its intended purposes" is not defined in the bill, but is intended to incorporate the standard of strict liability for products set out in the Restatement (Second) of Torts at section 402A (1965). The Restatement uses the same phrase to establish liability for products. A large majority of States has now adopted this section of the Restatement as their State law.

Determination of the defective conditions of the product under the bill would involve application of engineering and manufacturing knowledge which was reasonably feasible at the time the product left the manufacturer's control. Courts have recognized, and the Committee determined, that the analysis should focus on technology at the time of manufacture as opposed to current knowledge as of the time of the accident. See, e.g., *Bruce* v. *Martin-Marietta Corp.*, 544 F.2d 442, 447 (10th Cir. 1976) (evidence of the state-of-the art at the time the airplane was made is relevant to a strict liability claim); *McLaughlin* v. *Sikorsky Aircraft,* 195 Cal. Rptr. 764, 767 (1983), in which the court states: "Among the relevant factors, and security within the manufacturer's knowledge, are the feasibility and costs of an alternative design [citation omitted]. It seems apparent that evidence the design comports with the state of the art is relevant to a proper determination of such costs and feasibility factors."

A claimant must prove, as part of a prima facie case under the bill, that the aircraft was being used at the time of the accident within the operating limits for which it was designed and manufac-

tured. This section is intended to encourage responsible, safe, and legal operation of aircraft.

Subsection (b)(2) establishes a cause of action against a general aviation manufacturer for failure to provide warnings or instructions. The manufacturer is liable if, at the time the product left the manufacturer's control, the manufacturer (1) knew or should have known about a danger connected with the product; and (2) failed to provide warnings or instructions that a person exercising reasonable care would have provided with respect to the danger, unless such warnings would not have materially affected the conduct of the user of the product. The manufacturer is also liable if, after the product left the manufacturer's control, the manufacturer knew or reasonably should have known about a danger connected with the product, and failed to take reasonable steps to provide warnings or instructions that would have been provided by a person exercising reasonable care, unless such warnings would not have materially affected the conduct of the user of the product. In all instances, the failure to warn must be a proximate cause of the claimant's harm.

Subsection (b)(3) establishes a cause of action against a manufacturer arising out of an express warranty provided by the manufacturer. Liability exists if (1) the manufacturer makes an express warranty with respect to the product, (2) the warranty relates to the aspect of the product which caused the harm, (3) the product fails to conform to the warranty, and (4) the failure to conform to the warranty is a proximate cause of the harm. The focus is on the product's failure to conform to express representations about it made by the manufacturer. There is no requirement that the warranty be in writing in order to form the basis of liability.

This provision reflects generally accepted law which establishes strict liability to the consumer based on express representations made to him about the product. See Prosser and Keaton, "The Law of Torts" (5th Ed. 1984), section 97 at page 690. Similarly, the Restatement (Second) of Torts (1975) at section 402B states that a manufacturer whose product fails to conform to the manufacturer's own express warranty about a material fact concerning the character or quality of the product is subject to liability for harms caused by justifiable reliance upon the express warranty. This liability arises even though the warranty is not made fraudulently or negligently, and even though there is no contractual relationship between the claimant and the manufacturer. Id.

Subsection (c) establishes a defense to actions brought based on subsection (b). Paragraph (1) provides that a manufacturer shall not be liable if the manufacturer proves, by a preponderance of the evidence, that a defective condition could have been corrected by compliance with either an FAA airworthiness directive or a manufacturer's service bulletin. The directive or bulletin must have been issued within a reasonable time before the accident occurred, and after the product left the control of the manufacturer.

The FAA issues airworthiness directives (49 App. U.S.C. 1421; 14 C.F.R. Part 39) and manufacturers issue service bulletins to notify aircraft owners, operators, and other interested persons of an unsafe condition, in order to ensure the airworthiness and operational safety of the aircraft. It is the owner or operator of the aircraft, not the manufacturer, who has the primary legal responsibil-

ity for maintaining the aircraft in an airworthy condition, including compliance with airworthiness directives. See 14 C.F.R. 91.163(a), 91.173(a)(2)(v). Thus, when an airworthiness directive or service bulletin is issued after the product leaves the manufacturer's control and at a point in time before the accident which would have provided a reasonable time for the defective condition to be corrected, it is reasonable to require the owner or operator to bear the responsibility for failure to correct the defective condition.

Paragraph (2) of subsection (c) permits evidence of compliance with FAA standards, conditions, or specifications to be admissible in actions governed by subsection (b) with regard to the defective condition of a product. This is not an absolute defense, only evidence to be considered by the trier of fact. The provision reflects established case law which upholds the right of a manufacturer to introduce evidence of compliance with Federal safety standards. See, e.g., *Wilson* v. *Piper Aircraft Corp.*, 577 P.2d 1322 (Or. 1978); *Hager* v. *Mooney Aircraft, Inc.*, 407 N.Y.S.2d 978 (1978); *Bruce* v. *Martin-Marietta Corp.*, 544 F.2d 442 (10th Cir. 1976). See also, Shapo, "The Law of Products Liability" (1987), para. 11.03[5] at 11-12.

Section 6.—Comparative responsibility

This section establishes a general rule of comparative responsibility among the parties to an action covered by the bill. Under this rule a claimant's recovery is not precluded by the claimant's own negligence but is merely reduced in proportion to the claimant's percentage of responsibility.

Subsection (a) states that the claimant's negligence reduces the amount of damages payable in proportion to the percentage of responsibility attributable to the claimant. It requires the trier of fact to determine comparative responsibility by making a determination of the respective percentage of responsibility for the claimant's harm attributable to the claimant, each defendant, and persons not parties to the action. The claimant's damages are thus reduced by an amount in proportion to the claimant's percentage of responsibility. For example, if the trier of fact determines that defendant A is 40 percent responsible for the harm, defendant B is 40 percent responsible, and the claimant is 20 percent responsible, the claimant's damages will be reduced by 20 percent. The claimant can recover from a defendant even if the claimant is proportionately more responsible for the harm, although the claimant's damages will be reduced in accordance with his or her proportionate responsibility.

Subsection (b) establishes, subject to exceptions in subsection (c), that each defendant's liability shall be several, but not joint, and in proportion to the defendant's share of the responsibility for the claimant's harm.

The Committee believes that legal rules which fail to hold a person proportionately responsible for damages caused by unsafe actions could undermine the Federal policy of attempting to ensure safety in the activities of all persons involved in general aviation. A rule permitting the imposition of the claimant's entire damages on a defendant whose conduct may have been a minor factor in causing the harm has the potential for lessening the incentives

necessary for a safe general aviation system. Moreover, joint and several liability may encourage actions against a defendant who has substantial assets no matter how minor that defendant's contribution to the accident. Sound aviation policy is enhanced by allocating damages in most instances in proportion to each party's responsibility for an accident.

Subsection (c) establishes 2 exceptions to subsection (b) and provides for joint and several liability in 2 circumstances. First, a manufacturer who is the builder or manufacturer of the airframe of the aircraft involved in an accident is jointly and severally liable when the harm is caused by a defective system, component, subassembly, or other part of the aircraft that the manufacturer either installed or certified as part of the original type design. Second, a manufacturer of a system or component of the aircraft is jointly and severally liable for harm caused by a defective subassembly or other part of such system or component.

The imposition of joint liability in these two circumstances is justified and consistent with sound aviation policy because a general aviation manufacturer should be responsible for the defect in its product that caused the claimant's harm. It is appropriate to make the aircraft manufacturer responsible for any defects in the parts and systems of the entire assembled aircraft because the manufacturer exercises control over the selection of manufacturers of systems, components, subassemblies, and other parts. Similarly, manufacturers of a system or component are in a position to select the subassembly or other part and, therefore, should be responsible for harm caused by that defective subassembly or part.

Aside from these two instances, a general aviation manufacturer should not be jointly liable for damages, but liable only for its proportionate share of the damages. For example, a general aviation manufacturer would not be responsible for damages caused by an owner, a pilot, or a repair station whose act or omission caused the claimant's harm. The section thereby relieves the aviation manufacturer from responsibility for damages caused by the independent conduct of a third party over whom the manufacturer has no control.

Subsection (d) provides that any persons jointly liable under this section shall have the right to bring an action for indemnity or contribution from any person with whom they are jointly liable.

Section 7.—Time limitation on liability

This section establishes a time limit after which an aviation manufacturer no longer has any liability for harm caused by an aircraft, often referred to as a statute of repose. Subsection (a)(1) provides that no action alleged to have been caused by an aircraft may be brought for harm which occurs more than 20 years from either (A) the date of delivery of the aircraft to its first purchaser if delivered directly from the manufacturer, or (B) the date of first delivery to a person engaged in selling or leasing aircraft. Paragraph (2) deals with replacement or additional parts or systems. In a case alleging harm caused by a system, component, subassembly, or other part which replaced a part in, or was added to, the aircraft the 20-year time limit does not begin to run until the date of the replacement or addition.

The rationale for this time limitation is that general aviation manufacturers should not be exposed to liability for harm caused by their product for an unlimited period of time. The time limitation in this section provides some protection for the manufacturer from such a result and at the same time protects claimants' reasonable rights to recovery. Accidents involving general aviation aircraft which have been in use for 25 or 30 years or more are not likely to be due to any defect in the design or manufacture of the product because the product has operated safely for a very long period of time. Such accidents are more likely to be due to improper maintenance or repair of the product or operator error, activities over which the manufacturer has no control.

Over 20 states have enacted statutes of repose, most of which are considerably shorter than 20 years, typically ranging between 6 and 12 years. See, e.g., SDCL section 15-2-12.1 (1978) (6 years); Tenn. Code Ann. section 29-28-103 (as amended 1979) (6 years); ARS 12-551 (Arizona) (12 years). Section 7 establishes a 20-year period to ensure that claimants are not unfairly barred from suing for harm arising out of a general aviation accident within the time period in which any defects in design or manufacture are likely to become evident.

Subsection (b) provides that the 20-year time limit does not apply if there is an express warranty from the manufacturer or seller of the product causing the harm that it would be suitable, for the purpose intended, for a period longer than 20 years. In such instances, the manufacturer would be liable for the longer period provided in the warranty.

Subsection (c) makes clear that the time limitations in section 7 do not affect a manufacturer's duty, after the sale or lease of an aircraft, to provide additional or modified warnings or instructions regarding the use or maintenance of an aircraft, system, component, or part. In this respect, section 7 is more favorable to claimants than the statute of repose provsions of some State laws that apply time limitations to the duty to warn. See, e.g., *Dauge* v. *Piper Aircraft Corp.*, 418 N.E.2d 207, 211 (Ind. 1981).

Section 8.—Subsequent remedial measures

This section expressly adopts Rule 407 of the Federal Rules of Evidence for actions covered by the bill. It provides that evidence of any measure taken after an event which, if taken previously, would have lessened the likelihood of the event's occurring, is inadmissible to prove liability, and is admissible only to the extent permitted by Rule 407. The primary basis for this rule is the social policy of encouraging people to take steps in furtherance of added safety. Additionally, there is some question as to whether such evidence is relevant to issues of liability at the time the product was made. See, Notes of Advisory Committee on Proposed Rules of Rule 407, Federal Rules of Evidence. Section 8 is intended to encourage general aviation manufacturers to improve the safety of their products without the fear that such evidence could be used against them in cases involving older products.

Under this section evidence of subsequent remedial measures is admissible to the extent permitted under Rule 407, which provides

that such evidence is admissible to prove ownership, control, feasibility of precautionary measures, if controverted, or impeachment.

Section 9.—Admissibility of certain evidence

This section provides that evidence of the tax liability of any sort attributable to past or future earnings, support, or profits alleged to have been lost or diminished as a result of an accident is admissible in connection with the proof of the claimant's harm, as is evidence of the present value of such future earnings support, or profits. The U.S. Supreme Court has recognized the admissibility of evidence of tax consequences of damages awarded to the claimant in claims arising out of injuries to railroad workers. *Norfolk & Western Ry.* v. *Liepelt,* 444 U.S. 490, 498(1980).

Section 10.—Punitive damages

This section establishes the standards for awards of punitive damages in general aviation liability actions.

Subsection (a) provides that punitive damages may be awarded only if the claimant establishes by clear and convincing evidence that the harm was "the direct result of conduct manifesting a conscious, flagrant indifference to . . . safety . . ." A mere failure to exercise reasonable care does not amount to the conduct necessary for awarding punitive damages. Punitive damages serve the function of punishing the defendant for outrageous conduct and deterring such conduct in the future by the defendant and by others. For this reason, such damages generally are given to the claimant over and above the full compensation for the claimant's injuries. See Restatement (Second) of Torts section 908(1) (1965). Because of the basis and nature of such damages, they have been said to have some elements of criminal penalties. See Prosser and Keeton, "The Law of Torts" (5th ed. 1984), section 2 at page 9. For this reason, the standard of proof used in this section, "clear and convincing evidence," is higher than the "preponderance of the evidence" standard generally applied in tort actions but lower than the criminal law standard of proof "beyond a reasonable doubt."

Subsection (b) limits the admissibility of evidence regarding the financial worth of a defendant or other evidence relating solely to punitive damages. Such evidence is admissible only if the claimant can establish, before the evidence is offered, the ability to present prima facie proof of conduct justifying an award of punitive damages.

Subsection (c) relates to wrongful death actions where applicable State law provides that only damages termed "punitive" are recoverable. See Ala. Code section 6–5–410. In such situations, punitive damages are in fact a substitute for compensatory damages. Subsection (c) provides that a defendant may be liable for any such damages, regardless of whether a showing is made as required by this section of the bill. The subsection further provides that recovery of such punitive damages under State law will not bar a claim under this section.

Section 11.—Time limitation on bringing actions

Section 11 preempts State law statutes of limitations, establishing the time within which actions may be brought, with respect to

actions governed by this bill. If an action is not brought within the specified time period, here 2 years, the action is barred. Statutes of limitations encourage the prompt filing and resolution of claims. The longer a claimant waits to file his or her action, the greater the likelihood that the evidence will have become "stale" and recollection of facts will have diminished. Paragraph (1) of subsection (a) provides that any action arising out of a general aviation accident is barred if a complaint is not filed within 2 years after the date on which the accident occurred. This 2-year period provides ample time for the claimant to make a preliminary assessment of his or her case and to determine whether to file an action. This is particularly true with general aviation accidents, which generally involve traumatic injuries of which the claimant is immediately aware rather than latent harm The "time of discovery rule" which is sometimes applied in product liability actions is obviously not necessary for actions arising out of general aviation aircraft accidents.

Paragraph (2) provides that the summons and complaint must be properly served within 120 days after the filing of the complaint. The section provides for an exception from the service requirement for good cause, or in cases of service of process in foreign countries pursuant to Rule 4(i) of the Federal Rules of Civil Procedure or similar State law. The purpose of this provision is to ensure that the defendant receives timely notice of the complaint so that he or she may have a reasonable opportunity to investigate the facts and respond.

Section 12.—Sanctions

This section requires the strict enforcement of the sanctions provided for by Rule 11 of the Federal Rules of Civil Procedure, in actions governed by the bill.

Rule 11 requires that every pleading or other paper filed with the court be signed by an attorney or by any party who is not represented by an attorney. The Rule provides that, in both cases, the signature constitutes a certificate by the signer that he or she had read the paper to be filed, and that to the best of his or her knowledge, formed after reasonable inquiry, it is well grounded in fact and law, and not filed for any improper purpose such as delay. If a filing is signed in violation of this Rule, the court shall impose upon the person who signed it an appropriate sanction, which may include reasonable expenses incurred because of the filing, including a reasonable attorney's fee.

Section 12 states that sanctions for violation of this Rule should be strictly enforced in actions covered by this bill.

Section 13.—Jurisdiction

Subsection (a) provides original jurisdiction for Federal district courts, concurrent with that of the State courts, over civil actions arising out of general aviation accidents, without regard to the amount in controversy. Claims arising under this bill arise under Federal law and are appropriately Federal question cases. Federal court jurisdiction is warranted on that basis.

Subsection (b) permits a defendant in such an action in State court to remove the action to Federal district court without the

consent of any other party, and without regard to the amount in controversy.

Subsection (c) gives the Federal district court in such cases jurisdiction to determine all claims arising under State law if a substantial question of fact is common to the State law claims and the Federal claim, defense, or counterclaim. This subsection will apply particularly if issues are present in the case which are not addressed by this bill so that State law is not preempted, or if the accident at issue involves a non-general aviation means of transportation to which this bill would not apply. Providing jurisdiction over all claims arising out of the same accident should promote efficient use of judicial resources.

Subsection (d) provides that venue of such a case in Federal court may be in the district in which the accident occurred, or in which any plaintiff or defendant resides. Transfer of venue is permitted on the court's own motion or the motion of any party, for the convenience of parties and witnesses, in the interest of justice.

Subsection (d) also provides that, for venue purposes, a corporation is considered a resident of any State in which it is incorporated, licensed to do business, or doing business.

Section 14.—Severability

This section provides that if any provision of the bill, or the application of any provision to any person or circumstances, is held invalid, the remainder of the bill and its application to any other person or circumstance shall be unaffected.

Section 15.—Effective date

This section makes the bill applicable to any civil action otherwise covered by the bill which is filed on or after the date of the bill's enactment into law. It further provides that, for any action governed by the bill and filed within 180 days after enactment of the bill, a party shall be given liberal leave to amend any filing to conform with the provisions of the bill. This provision is intended to assure that parties will be given the opportunity to amend complaints, motions, or other filings to conform to the substantive provisions of law established under this bill.

MINORITY VIEWS OF MR. HOLLINGS

INTRODUCTION

The General Aviation Liability Standards Act is ill-advised as a policy matter and substantively flawed. It has been touted as the last, best hope of saving the U.S. general aviation industry. However, there is virtually no evidence that amendment of the tort system will cure the ills of this, or any other, industry. Moreover, the Federal tort law the bill creates has the potential for confusion, unintended consequences, and inappropriate results. Thus, I believe that enactment of this legislation would have serious adverse consequences for the tort system without any corresponding guarantee of advancing its stated purpose. As Committee Chairman, it is not my role to thwart consideration of measures which have some support within the Committee, and I therefore scheduled this matter promptly for Committee consideration. However, for the reasons set out below, I continue to believe that this legislation is unwise and should not be enacted.

UNWISE POLICY

Supporters of this legislation argue that it is necessary to shore up a failing general aviation industry in this country. I share their concern for this vital industry. However, I have seen no evidence that altering the carefully crafted tort laws of the individual States for this one industry will cure the industry's financial problems. Similarly, I have seen no evidence that the current tort system has led to unjust results for those involved in accidents, or that this industry should receive any different treatment than the many other industries that are experiencing a downturn in business.

Supporters of the bill attempt to distinguish this industry based on the existence of Federal regulation of some aspects of its operation. This doesn't work for several reasons: (1) this is one of many industries that are subject to Federal regulation to address the safety of their product; (2) all aspects of the industry are certainly not regulated; and (3) Federal regulations provide only minimum safety standards and should not provide an excuse for relieving the industry of its obligations to the users of its aircraft.

In my view, this legislation could create a disturbing precedent to be urged by every industry that finds itself in financial difficulty, without any idea of whether it addresses the problem effectively, or at all. It creates the real possibility of upsetting a tort system that is working properly and yielding generally just results. Alteration of the tort system is not a panacea for industries in trouble, and we should not endorse its use for that purpose.

There is no doubt that the number of aircraft reported sold by this industry has decreased significantly over the last decade, and that the industry reports increased product liability costs, although

its dollar amount of sales has remained relatively constant. That hardly ends the inquiry.

As the Congressional Research Service has recognized, "[n]o single factor can explain the collapse of demand for new general aviation aircraft." Congressional Research Service (Fischer and Arabian), "The Demand for General Aviation Aircraft: Background, Analysis and Outlook," Report No. 85-1108E (December 6, 1985) at page 6. The Department of Commerce, in an assessment of the U.S. general aviation industry published in June, 1986. (U.S. Department of Commerce, International Trade Administration, "A Competitive Assessment of the U.S. General Aviation Industry," June 1986), stated that the sharp decline in airplane deliveries "reflects depressed market conditions as well as shifting patterns in aircraft demand. In today's market, the emphasis is gradually shifting from piston-powered airplanes to larger, higher-valued turboprops and business jets." Id. at page iii. The Department of Commerce also recognized that ". . . the sharp decline in sales that has occurred in the 1980's is not the anomaly in market demand, but rather [the anomaly is in] the late 1970's when record-breaking sales were achieved." Id. at page 58. The report cited several other causal factors for the protracted downturn in general aviation business including escalating foreign competition, the relative value of the dollar, the number of active pilots, product liability costs, and U.S. tax reforms. Id. at pages iii and 58-9.

Additionally, the FAA has recognized the diversity of alternative theories for the decline in general aircraft sales: "Some cite high aircraft prices and the availability of low cost alternatives such as ultralights. Others hypothesize that high operating costs and interest rates have been responsible for depressing the industry. Still others allege that the changes in tax laws and high product liability costs are responsible." (U.S. Department of Transportation, Federal Aviation Administration, "FAA Aviation Forecasts, Fiscal Years 1988-1999," February 1988, at page 70.) The FAA went further, recognizing the possibility of deeper underlying reasons for the decline in sales: "Although the economics of the industry are important in affecting people's choices, we cannot overlook the fact that we may also be experiencing a fundamental change in the tastes and preferences of the population. Changing tastes could upset the fundamental economic equations that have held for many years for the industry. If this phenomenon is occurring, then falling prices, operating costs, and real interest rates, accompanied by economic growth, may not be sufficient to revive the market. Ibid., page 70.

Finally, "Flight International", a trade magazine covering aviation issues, recognized in a January 1985 editorial, that: "[t]he number of aircraft in use has stabilized and since aeroplanes, once built, are lovingly maintained and only reluctantly scrapped, new ones are not required in the number they once were. The market has stabilized; growth is at an end; and only limited replacements will provide sales in the foreseeable future. The numbers have been falling not because of the recession. They have fallen because there are as many aeroplanes around as people want. That is the cold reality." "Flight International", vol. 127, no. 8941 (Jan. 5, 1985) at page 1.

Thus, at a minimum, there is disagreement about the causes for the current situation in the general aviation industry. Given the combination of forces involved, it is unreasonable to conclude that revision of the tort laws would be an effective remedy. Indeed, the Department of Commerce properly recognized that the Federal Government's ability to alter market forces is limited. However, in addition to legislation involving tort laws, it suggested several other legislative activities that may address the problem, including tax reform legislation, action regarding fair trading practices, incentives for research and development, airport funding, and exchange rate stabilization. Department of Commerce, "A Competitive Assessment of the U.S. General Aviation Industry," supra., at pages iii and 60.

Additionally, the fact that the industry reports increased product liability costs tells us nothing about the fairness of the results in these product liability cases. It is at least possible that the industry has begun, in recent years, to pay its appropirate share of the costs of accidents.

The supporters of the legislation have not produced any evidence about the nature of general aviation's product liability costs that would indicate that the industry has paid more than the amount reasonably required by its share of responsibility for accidents. On the contrary, the Congressional Research Service has stated: "[t]he industry, and the FAA, have frequently been criticized by such agencies as the General Accounting Office for not stressing safety in general aviation aircraft design. For example, the requirement for shoulder harnesses in general aviation aircraft is of relatively recent origin even though they have been available for a considerable period of time. There is, as a result, a feeling in some quarters that the industry's liability problem is a problem of its own making from which the government has no obligation to grant relief." Congressional Research Service (Fischer and Arabian), "The Demand for General Aviation Aircraft: Background, Analysis and Outlook," Report No. 85-1108E (Dec. 6, 1985) at pages 8-9.

Finally, although the industry testified before the Committee that most companies in the industry are either self-insured or uninsured up to a very high amount of liability, they suggest that there is no insurance problem involved in their difficulties. See, e.g., Hearing Before the Subcommittee on Aviation of the Committee on Commerce, Science, and Transportation, S. Hrg. 100-480 (100th Cong. 1st Sess.) (hereafter Committee Hearing) at page 30 (Statement of Edward W. Stimpson, President, General Aviation Manufacturers Association). However, if the industry is uninsured against very large losses, it will pay the entire amount of any such losses out of its assets rather than paying a set amount as an insurance premium. This inability to obtain insurance protection against losses for a fixed premium amount surely must contribute to any high product liability costs the industry reports. While the industry does not focus on the unavailability of commercial insurance as one source of these costs, it is difficult to conceive of an effective solution to this situation that does not address the industry's insurance availability.

Thus, there obviously is no definitive information available on either the primary cause for the indstury's difficulties or the most

effective cure. What we do know beyond doubt is that a myriad of factors have contributed to the current situation, not the least of which is a major, and possibly irreversible, change in the demands of the market. Given the absolute lack of evidence supporting the claim that the current tort system yields unfair results, to launch an assault, such as that proposed by this legislation, on the carefully-evolved State tort system is without justification.

ILL-CONSIDERED SUBSTANTIVE PROVISIONS

This bill represents what is, in my view, an unwise policy choice. In addition, S. 473 carries out that policy by means of several provisions that yield inappropriate or unintended results. A few of these problems will be discussed below.

1. Uniformity.—Supporters of the bill claim that it will assist the industry by promoting uniformity in the applicable tort law. However, the bill creates jurisdiction over cases arising under the law in all Federal district courts concurrent with the fifty State courts. This could result in literally hundreds of different interpretations of the law. Moreover, Federal courts other than the Supreme Court apparently do not have the authority to bind the State courts within their jurisdiction. See, e.g., *Testa* v. *Katt,* 330 U.S. 386 (1947); *Cooper* v. *Aaron,* 358 U.S. 1, 18 (1958); *United States ex rel. Lawrence* v. *Woods,* 432 F.2d 1072, 1075–76 (7 Cir. 1970), cert. denied 402 U.S. 983 (1971); Note, "Authority in State Court of Lower Federal Court Decisions on National Law," 48 Columbia L. Rev. 943, 954 (1948); Stern and Gressman, *Supreme Court Practice* (5th ed. 1978) at 280; *Payton* v. *New York,* 445 U.S. 573, 575 n. 4 (1980). Thus, even should all 11 Federal circuits ultimately decide an issue, which would take years even under the best of circumstances, the potential still exists for eleven Federal interpretations and fifty State court interpretations of a single provision of Federal law. Far from creating uniformity and predictability, this will create chaos and confusion for both the parties and the courts. This is hardly the simple, clear-cut body of law the industry claims to want.

2. Application of Both Federal and State Law.—Section 4(a) of this bill by its terms preempts State law only to the extent that the bill establishes an applicable Federal rule of law or procedure. Additionally, by virtue of sections 4 (c) and (e), the bill would have no applicability to the claims of occupants, manufacturers, or others involved with a non-general aviation aircraft or other mode of transportation. Yet, particularly in an accident between a general aviation aricraft and another aircraft or vehicle not covered by the bill, some plaintiffs and defendants will be covered by State law, and some will be covered by this Federal law. In such cases, however, section 13(c) of the bill provides that the Federal court deciding the general aviation case also could have jurisdiction over the non-general aviation State law claims. Thus, rather than creating a simple, predictable area of litigation, this bill could result in the trier of fact having to apply State law to some issues and parties and Federal law to others in the same case. Additionally, as discussed above, there could be varying interpretations of Federal law between the Federal and State courts within the same State. If the

industry wants a uniform, predictable body of law in which to litigate its accidents, it does not have it in this bill. On the contrary, the bill will be likely to confuse the issues so much that claimants have difficulty obtaining a fair compensation for thier injuries.

3. Broad Applicability.—This bill was represented by its supporters at the Committee hearing as covering small private and business aircraft. Much was made of the fact that the bill has the support of the "consumers", primarily owners and pilots of private and business aircraft. Committee Hearing (S. Hrg. 100-480) at pages 97-8 (Statement of Jonathon Howe, President, National Business Aircraft Association) and pages 111-113 (Statement of John S. Yodice, General Counsel, Aircraft Owners and Pilots Association). A broad coalition of consumer organizations (See Committee Hearing (S. Hrg. 100-480) at pages 128-133 (Letter dated Dec. 16, 1987 from Gene Kimmelman, Consumer Federation of America; Linda Lipsen, Consumers Union; Eric Hard, Public Citizen's Congress Watch; and Pamela Gilbert, US PIRG)) have pointed out that, even when the universe is limited to such aircraft, the "consumers" who support this bill do not represent the passengers who may have no choice about utilizing these aircraft.

Additionally, the definition of "general aviation aircraft" is apparently broad enough to permit an argument that the bill covers helicopters, hang gliders, and hot air balloons, all of which are issued type certificates by the FAA. Particularly in the case of medivac helicopters, there is far from a free choice to accept a ride in these aircraft. Moreover, there is no evidence before the Committee about the accident rate in these aircraft, the needs of those industries, or the fairness of the tort system as applied to those accidents. Even were the general aviation industry entitled to some special treatment, and I have seen no evidence to justify that, this bill could be read to provide relief to a much broader segment of the aviation industry. Even as applied to the general aviation industry it is unwarranted. Its application beyond that industry is completely without justification and extremely dangerous to consumers.

4. Joint and Several Liability.—Sections 6 (b) and (c) of the bill eliminate joint and several liability for all except two circumstances. This reverses the law in the majority of States, which currently applies joint and several liability to insure that the plaintiff does not have to bear the loss if a defendant is insolvent or beyond the jurisdiction of the court. See generally, Prosser, *The Law of Torts* section 52 (5th Ed. 1984). The States have appropriately concluded that it is unfair to require the plaintiff to bear the loss in those circumstances. Reversal of that result undermines the fairness currently built into the tort system.

5. Comparative Responsibility.—In section 6(a) of the bill, the comparative responsibility rule requires apportionment of responsibility among all claimants and defendants as well as parties not before the court. Including parties not before the court in this process while at the same time eliminating joint and several liability creates the very real possibility that a portion of the damage will be uncompensated and that the loss will be felt by the claimant rather than any defendant, regardless of their respective levels of

responsibility for the harm. Making the plaintiff absorb this loss is unfair.

6. Defense Based on Manufacturer's Service Bulletin.—The bill provides a complete defense for the manufacturer if a defective condition could have been corrected by compliance with an FAA airworthiness directive or a manufacturer's service bulletin, and makes no distinction between the two publications. It is inappropriate to provide a complete defense to the manufacturer in either circumstance, since such a provision does not allow for factual situations in which the manufacturer should properly retain some responsibility, notwithstanding the failure to comply with either publication.

Additionally, the two publications are not identical in nature and should not be so treated by the bill. An airworthiness directive is issued by the FAA pursuant to law to insure the airworthiness of an aircraft, and legal responsibility for compliance with the directive is generally with the owner or operator of the aircraft. 14 C.F.R. 91.163(a), 39.1, 39.3, 39.11 (1988). By contrast, a manufacturer's service bulletin is issued at the complete discretion of the manufacturer with no FAA involvement or approval, and no vesting of legal responsibility for compliance. To provide a complete defense based on non-compliance with a manufacturer-generated document creates a danger of issuance of such bulletins for reasons related only to protection from product liability actions, and of unfair results for claimants.

7. Intended Use Standard.—In many States under current law, a manufacturer is liable for injuries occurring from all foreseeable uses of a product if the injuries were caused by the defective aspect of the product. See Prosser, *The Law of Torts,* supra, at section 710–712. By contrast, section 5(b)(1)(C) of this bill would bar recovery in cases in which the aircraft was not being used "for a purpose and in a manner for which it was designed and manufactured." One could conceive of arguments based on this language to relieve the manufacturer of liability for any use, no matter how foreseeable, that the manufacturer did not specifically intend. For example, two situations which are clearly foreseeable and should be addressed in design and manufacture of an aircraft are presented when a pilot must respond to an emergency situation or when an aircraft crashes. Yet this bill may permit arguments that a manufacturer has no obligation to consider these possibilities in designing its aircraft. This could impose an additional, and in my view unfair, burden on plaintiffs.

8. Standard of Liability.—In almost all States, current law applies the doctrine of strict liability to produce liability cases. Kreindler, *Aviation Accident Law* (1983) section 7.04[1] at pages 7–55 to 7–57. In many, but not all, jurisdictions, the aircraft's compliance with state-of-the-art technology and safety standards may be used as a defense. See Spradley, "Defensive Use of State of the Art Evidence in Strict Products Liability," 67 Minn. L. Rev. 343, 381–394, 403–407 (1982). The individual States have arrived at what each considers to be a fair balance of the rights of the respective parties. However, section 5(b)(1)(A) of this bill would tip this balance in favor of the manufacturers in two ways. First, it apparently requires that the plaintiff carry an unusual burden of proof by

showing that the produce was in a defective condition "according to engineering and manufacturing practices which were reasonably feasible." Typically, state-of-the-art evidence, if relevant at all, would be used only as part of the defendant's case. Second, the language may be subject to varying interpretations, some of which do not hold the manufacturer to the appropriate standard of current technology and safety.

9. Statute of Repose.—The bill would create a nationwide statute of repose of twenty years. This would mean that, regardless of the cause of the accident, no one could recover for harm in an accident involving an aircraft more than twenty years old. Less than half the States now have statutes of repose. I do not believe we should impose such strict bars to recovery on plaintiffs across the country contrary to the decisions made by their individual State legislatures.

These are but a few examples of the myriad of difficulties I expect to arise should this bill become law. I do not believe correction even of all of the problems listed above will make this bill fair and reasonable.

CONCLUSION

In my view this legislation represents a drastic step away from reliance on carefully-evolved State tort law. It is being taken without any evidence that it is fair or workable, or that it will save the ailing general aviation industry. Even without more, the fact that the industry clearly expects to save a significant amount of money in product liability expenses as a result of this bill should raise questions among all those interested in the fair treatment of the consumer. I urge my colleagues to reject this untoward effort.

ERNEST F. HOLLINGS.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee states that the bill as reported would make no change to existing law.

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Calendar No. 734

100TH CONGRESS *2d Session*	SENATE	REPORT 100-385

AMTRAK AUTHORIZATION

Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

OF THE

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 2320

JUNE 15 (legislative day, JUNE 13), 1988.—Ordered to be printed

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Calendar No. 734

100TH CONGRESS
2d Session

SENATE

REPORT
100-385

AMTRAK AUTHORIZATION

JUNE 15 (legislative day, JUNE 13), 1988.—Ordered to be printed

Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

[To accompany S. 2320]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 2320) to amend the Rail Passenger Service Act to authorize appropriations for the National Railroad Passenger Corporation, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE OF THE BILL

The bill, as reported, would reauthorize funding for Amtrak for three years, in the sum of $630 million for fiscal year 1989, $656 million for fiscal year 1990, and $681 million for fiscal year 1991. The bill also would modify the Rail Passenger Service Act insofar as it subjects Amtrak to Freedom of Information Act (FOIA) requirements.

BACKGROUND AND NEEDS

In 1970, the Railroad Passenger Service Act was enacted, creating Amtrak. Its purpose was to free the rail freight industry from the economic burden of providing ongoing passenger services, and to ensure that modern, efficient, intercity railroad passenger service would continue to be a part of the Nation's transportation system. Since that time, Amtrak has received Federal funding to help cover its operating, capital, and labor protection costs.

Funding for Amtrak was most recently authorized in the Omnibus Budget Reconciliation Act of 1985, for fiscal years 1986 through 1988. For budgetary reasons, actual appropriations for Amtrak

have not matched those authorized for the corporation. The authorized spending level for Amtrak for fiscal year 1988 is $630.3 million, whereas the actual appropriation level for Amtrak approved in the Continuing Resolution for fiscal year 1988 is $580.8 million, a reduction from the $602 million appropriated for Amtrak in fiscal year 1987.

Amtrak has improved its financial and ridership performance over the last several years. Its revenue-to-cost ratio has increased from 56 percent in fiscal year 1984 to 65 percent in fiscal year 1987. A record $973 million in revenue was generated in fiscal year 1987, which represents an increase of 13 percent over the fiscal year 1986 level. Amtrak's total fiscal year 1987 expenses of $1,672.0 million represent an $108.4 million increase from the previous year's $1,563.6 million, although proportionally this increase is less than the growth in revenues. The total number of passengers carried on Amtrak-operated trains grew from 21 million in fiscal year 1986 to 30.6 million in fiscal year 1987, largely because of additional operating commuter service. With respect to service in fiscal year 1987, its on-time performance decreased from 80 percent in fiscal year 1984 to 74 percent, which is approximately the same level as it was in fiscal year 1986.

Amtrak's significant financial improvement during the past several years can be attributed in large part to the excellent return on capital invested in Amtrak during the late 1970s and early 1980s. This capital enabled Amtrak to purchase new rolling stock and new facilities, which has resulted in a significant reduction in the cost of operating and maintaining equipment.

Since 1981, however, the amount of appropriations available for capital investment has declined considerably. In fiscal year 1981, Federal capital grants amounted to $221 million. Although this Committee has since authorized funding levels that would have provided Amtrak with sufficient capital to fund many of its capital projects, the amount actually remaining from appropriated funds to cover capital costs declined to $2 million in fiscal year 1987. As a result of increased revenues from operations, the amount is $21.3 million in fiscal year 1988, which still constitutes a decline of some 91 percent since fiscal year 1981 in funds available for capital projects. For fiscal year 1989, Amtrak states that its capital program includes $311 million in important projects, although Amtrak is only requesting $72.6 million in actual capital funding because of Federal budget constraints.

The Committee recognizes and notes that improved facilities and equipment are necessary to enable Amtrak to grow and to provide better, more reliable service at less cost. Neglecting to invest in such improvements will prevent Amtrak from replacing critical capital assets once they are consumed. This is likely to result in Amtrak's reduced reliability, increased vehicle maintenance, deteriorating quality of service, and an increase in the cost of providing service. In fact, Amtrak's recent on-time performance decrease is in part due to its lack of sufficient rolling stock and the consequent overuse and undermaintenance of existing rolling stock to handle a growing passenger demand.

Amtrak has reached a critrical juncture with respect to its need for capital, and can no longer absorb the severe cuts in capital

grants that have characterized the past several years without a decline in the quality of its service. Increased emphasis on capital investment in Amtrak is vital now to protect and enhance the Federal investment in Amtrak's infrastructure and to enable continued progress in reducing the cost of operating rail passenger service.

The level of Federal assistance to Amtrak recommended by the Committee should be sufficient to fund most of Amtrak's most important capital projects and thereby enable Amtrak to continue its financial progress.

Legislative History

The Surface Transportation Subcommittee held a hearing on March 17, 1988, to review the operations of Amtrak and consider reauthorization of the corporation. During the hearing chaired by Senator Exon, the subcommittee heard testimony from the Federal Railroad Administration, Amtrak, the mayor of Hastings, Nebraska, and representatives of the American Association of State Highway and Transportation Officials, the Railway Labor Executives' Association, and the National Association of Railroad Passengers.

On April 25, 1988, as a product of this hearing, Senator Exon introduced S. 2320, to amend the Rail Passenger Service Act to authorize appropriations for Amtrak, and for other purposes. Senator Lautenberg is a cosponsor of S. 2320.

On April 26, 1988, the Committee met in open executive session to consider S. 2320. This measure was ordered reported, without objection.

Summary of Major Provisions

This legislation seeks to reauthorize Amtrak at levels which will allow it to continue operating its present system. These levels should ensure funding necessary to enable Amtrak to make capital improvements. This bill does not reflect the Administration's opposition to reauthorizing funds for Amtrak. Also excluded from the bill were a number of provisions proposed by Amtrak. The Committee has chosen not to address those issues at this time or believes they would be better addressed through collective bargaining or other forums.

As reported, S. 2320 would: (1) Reauthorize funding for Amtrak in the sum of $630 million for fiscal year 1989, $656 million for fiscal year 1990 and $681 million for fiscal year 1991; and (2) Eliminate the Freedom of Information Act requirements as applied to Amtrak in those limited instances when records are requested for commercial use or in connection with litigation or legal proceedings.

Estimated Costs

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 9, 1988.

Hon. ERNEST F. HOLLINGS,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the attached cost estimate for S. 2320, a bill to amend the Rail Passenger Service Act to authorize appropriations for the National Railroad Passenger Corporation, and for other purposes.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

JAMES L. BLUM,
Acting Director.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: S. 2320.

2. Bill title: A bill to amend the Rail Passenger Service Act to authorize appropriations for the National Railroad Passenger Corporation, and for other purposes.

3. Bill status: As ordered reported by the Senate Committee on Commerce, Science, and Transportation, April 26, 1988.

4. Bill purpose: S. 2320 would authorize appropriations for federal grants to the National Railroad Passenger Corporation (Amtrak) in fiscal years 1989 through 1990. For 1989, the bill would authorize grants up to $630 million, $49 million more than the current year's appropriation. The bill also provides for slight funding increases (about 4 percent each year) in 1990 and 1991. In addition, S. 2320 would amend the Rail Passenger Service Act to provide that Amtrak need not surrender records under the Freedom of Information Act when they are requested for commerical use.

5. Estimated cost to the Federal Government:

[By fiscal years, in millions of dollars]

	1989	1990	1991	1992	1993
Authorization level	630	656	681	.....	.....
Estimated outlays	567	622	677	67	34

The costs of this bill fall within budget function 400.

Basis of Estimate

The CBO assumed that the full amounts authorized would be appropriated. Outlay estimates are based on historical spending patterns.

6. Estimated cost to State and local government: None.

7. Estimate comparison: None.

8. Previous CBO estimate: None.

9. Estimate prepared by: Marjorie Miller.

10. Estimate approved by: James L. Blum, Assistant Director for Budget Analysis.

Regulatory Impact Statement

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation:

NUMBER OF PERSONS COVERED

This legislation provides an authorization of appropriations for fiscal years 1989, 1990, and 1991 to enable Amtrak to continue the current level of operation of rail passenger service. The Committee estimates that with the inclusion of commuter services, Amtrak-operated trains carried approximately 30.6 million passengers in fiscal year 1987. Also during fiscal year 1987, there were approximately 23,000 persons employed by Amtrak.

ECONOMIC IMPACT

The bill authorizes appropriations of $630 million for fiscal year 1989, $656 million for fiscal year 1990, and $681 million for fiscal year 1991. These funding levels are consistent with the current authorization level and take into account projected inflation during this time.

PRIVACY

The bill provides Amtrak with greater privacy by amending the Rail Passenger Service Act to exempt from Freedom of Information Act requests information generated by Amtrak of a commercial nature or for use in connection with litigation or other legal proceedings.

PAPERWORK

This bill should reduce paperwork for Amtrak by eliminating the need to comply with those FOIA requests when records are requested for commercial use or in connection with litigation or other legal proceedings. There should be no change in other paperwork requirements.

Section-by-Section Analysis

SECTION 1.—AUTHORIZATION FOR APPROPRIATIONS

This section would amend section 601(b)(2) of the Rail Passenger Service Act to authorize funding for Amtrak of $630 million in fiscal year 1989, $656 million in fiscal year 1990, and $681 million in fiscal year 1991.

The fiscal year 1989 authorization level was requested by Amtrak and represents a $49 million funding increase over the fiscal year 1988 appropriation level. It assumes funding in the sum of $72.6 million for needed capital improvements. The fiscal years 1990 and 1991 authorization figures take into account projected inflation of approximately 4 percent in each of those years.

This section recognizes that an elimination of Federal funding for Amtrak, as proposed by the Administration, would in all likelihood mean the elimination of rail passenger service in this country. The Committee continues to believe that preservation of rail

passenger service in the United States is important for the 30 million passengers that rode Amtrak last fiscal year and as an integral part of our national transportation network.

SECTION 2.—FREEDOM OF INFORMATION LIMITATIONS

This section amends section 306(g) of the Rail Passenger Service Act to provide that Amtrak not be required to make available any records which are requested for commercial use, or which are requested for use in connection with litigation or other legal proceedings.

Over 90 percent of Amtrak's FOIA requests in fiscal years 1986 and 1987 were from bidders or potential bidders seeking price or other information for commercial use, or were from litigants or their counsel seeking to supplement discovery in connection with legal proceedings. The proposed amendment would close access to such information and remove the adverse impact on Amtrak arising from such requests in connection with the acquisition of goods or services and the conduct of legal proceedings.

Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

The Rail Passenger Service Act

Section 306 of that Act

SEC. 306. APPLICABILITY OF THE INTERSTATE COMMERCE ACT AND OTHER LAWS.

(a) through (f) * * *

(g) The Corporation shall be subject to the provisions of section 552 of title 5, United States Code, *except that the Corporation shall not be required under such section to make available any records which are requested for commercial use, within the meaning of that term as contained in subsection (a)(4)(A) of such section, or which are requested for use in connection with litigation or other legal proceedings.*

(h) through (n) * * *

Section 601 of that Act

SEC. 601. AUTHORIZATION FOR APPROPRIATIONS.

(a) * * *

(b)(1) * * *

(2) There are authorized to be appropriated to the Secretary for the benefit of the Corporation—

(A) not to exceed $735,000,000 for the fiscal year ending September 30, 1982, of which not more than $24,000,000 shall be used for the payment of operating and capital expenses of rail passenger service provided pursuant to section 403(b) of this Act;

(B) not to exceed $788,000,000 for the fiscal year ending September 30, 1983, of which not more than $26,000,000 shall be used for the payment of operating and capital expenses of rail passenger service provided pursuant to section 403(b) of this Act;

(C) not to exceed $600,000,000 for the fiscal year ending September 30, 1986;

(D) not to exceed $606,100,000 for the fiscal year ending September 30, 1987; [and]

(E) not to exceed $630,300,000 for the fiscal year ending September 30, 1988[.]*;*

(F) not to exceed $630,000,000 for the fiscal year ending September 30, 1989;

(G) not to exceed $656,000,000 for the fiscal year ending September 30, 1990; and

(H) not to exceed $681,000,000 for the fiscal year ending September 30, 1991.

(3) through (5) * * *

(c) through (e) * * *

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